

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

DOCKET NO. 1:18-cr-226

vs.

NING XI,

Defendant.

TRANSCRIPT OF HEARING ON DEFENDANT'S MOTION FOR SUBPOENAS

BEFORE THE HONORABLE ROBERT J. JONKER, CHIEF JUDGE

GRAND RAPIDS, MICHIGAN

January 10, 2019

Court Reporter:

Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

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Grand Rapids, Michigan

January 10, 2019

2:01 p.m.

P R O C E E D I N G S

THE COURT: We're here on the case of the United States against Ning Xi, 1:18-cr-226. And we have a hearing on the motion for some early return subpoenas from the defense, and it's also a chance to talk a little bit more about the background of the case and make sure the Court understands the government's theory. And to the extent the defense is ready to outline its intended defense, where we're going on that.

But let's start with appearances, please.

MR. FRANK: Good afternoon, Your Honor, Assistant U.S. Attorney Hagen Frank for the United States, and to my left is the lead case agent Special Agent Bruce Fowler with the FBI.

THE COURT: All right.

MR. SAFER: Good afternoon, Your Honor, Ronald Safer on behalf of Ning Xi.

THE COURT: Okay. I was wondering how you pronounce it. Say it again, please.

MR. SAFER: Xi.

THE COURT: Xi? Thank you.

MR. SAFER: And with me is Valarie Hays, also on

1 behalf of Dr. Xi. And Ning Xi is present in court.

2 *THE COURT:* All right. Thank you.

3 I know it's your motion, Mr. Safer, but I want to
4 start with Mr. Frank and just get a sense of where the
5 government is going. All I really have is the case file, which
6 is limited on any discovery, obviously. And what I'm gathering
7 from the Indictment is that the government's got some
8 background in there but that your theory of the actual wire
9 fraud is tied to the specific instances you name seeking
10 airline fee reimbursement both from MSU and then from IEEE?

11 *MR. FRANK:* IEEE, yes, Your Honor.

12 *THE COURT:* Okay. All right. So give me -- that
13 much is -- I'm reading right. Just give me a little bit more
14 of an overview of how you see the case developing from the
15 government's perspective and where you intend to go with it and
16 how you intend to prove it.

17 *MR. FRANK:* Well, Your Honor, we have records from
18 MSU, from IEEE, or we'll refer to main IEEE, and then from a
19 fellow named -- it's pronounced Weihua Sheng, but it's spelled
20 W-E-I-H-A-U -- H-U-A -- excuse me -- H-U-A S-H-E-N-G. He was
21 a -- he did his doctoral work under Dr. Xi at MSU and now he's
22 a tenured professor out at Oklahoma State University.

23 So the sources of our documents come from IEEE, from
24 MSU, from Weihua Sheng who served as the treasurer on the
25 conferences that were named that are recited in the Indictment

1 and had oversight over the bank accounts that were established
2 to fund those conferences.

3 As I said, Weihua Sheng and Dr. Xi go way back to
4 when Sheng was getting his doctoral -- doing his doctoral work.
5 And he served as a treasurer on these conferences that -- for
6 which Ning Xi, Dr. Xi, served as chair. And these were -- the
7 overarching sponsor and organizer of these, these were
8 conducted under the auspices of IEEE.

9 The way that IEEE would run these conferences was
10 that the chair -- there would be two people who could draw on a
11 conference account, and it was the chair and the treasurer.
12 And so we got documents from Weihua Sheng that were given to
13 him by Dr. Xi, and he cut all these checks to Dr. Xi. And
14 those checks were supported by air travel -- by air travel
15 receipts and itineraries that were fabricated and forged.

16 We know they were fabricated and forged -- or we will
17 prove that they were fabricated and forged because there were
18 multiple varieties of fraud. In some cases the documents --
19 the ticket number never existed. Because obviously we got
20 records from the airlines also. That ticket number never
21 existed or that ticket number applied to a ticket, to a fare
22 that was flown by somebody other than Dr. Xi. Different place,
23 different time, different person. Or that ticket applied to a
24 booking that was made and then immediately canceled and never
25 flown, but nonetheless Dr. Xi would submit it for

1 reimbursement. So there was a big chunk of the fraud that
2 involved these IEEE funds.

3 Then in the same pattern of conduct we'll prove
4 relative to Michigan State University of submitting travel
5 reimbursement claims for travel that did not occur. We'll
6 prove the travel did not occur either because that ticket never
7 existed or that ticket existed for a different person or that
8 ticket was canceled and a refund was made, sometimes in the
9 space of the same day, and then much later would be submitted
10 by Dr. Xi for reimbursement.

11 And then sometimes we've got itineraries where, you
12 know, sometimes he would put in the same claim, the same
13 provably fraudulent claim to MSU and IEEE and be reimbursed by
14 both of them for air travel.

15 So our focus -- and this even went on to -- extended
16 to the travel claims where he put in a claim for limo rides
17 between Okemos and Detroit and submitted forged documents in
18 support of that.

19 So in a nutshell our overarching theory of the case
20 is that we have someone who rose to a very high level in both
21 MSU and IEEE, he was a distinguished professor at MSU and he
22 was a fellow at IEEE, which put him in their hierarchy in the
23 top fraction of a percent of all the members of IEEE.

24 *THE COURT:* Okay. In terms of discovery you've
25 already provided the defense, can you summarize that? And I

1 guess start with this: Is there more to be produced, or have
2 you produced everything you've got?

3 *MR. FRANK:* Your Honor, I'm not going to commit on
4 the record to having provided open-file discovery, but I think
5 we have --

6 *THE COURT:* All right.

7 *MR. FRANK:* -- at this point. We have received a
8 massive volume of records from Michigan State University. We
9 received all the records that Dr. Sheng out in Oklahoma had
10 archived from the various conferences for which he served as
11 treasurer. We have received documents from IEEE. We've
12 provided those in two and a half waves to the defense.

13 The defense also sent us a very detailed and
14 enumerated request for specific information wanting to know
15 whether we had provided that already or were going to provide
16 that. We came back with what I think is a very fulsome
17 response saying, you know, this is what's been provided, this
18 is where you will find it in the provided materials. So it's
19 not that -- we didn't just do a document dump on them and say
20 "Find it yourself." We've given them what I think is a pretty
21 decent roadmap to where it is in the produced materials.

22 Last week we provided additional materials that we
23 had obtained from MSU. I think that -- and I think it would be
24 humanly impossible for the defense to have digested all of that
25 at this point. So I don't think that -- I'm confident that

1 they will not be in a position to say -- I would be surprised
2 if they were able to say at this point which items specified in
3 their motion they still need. But I'm sure there will be
4 things that have not been provided that they still need.

5 So in terms of what still is forthcoming from the
6 government, at this point I don't see anything other than
7 Jencks materials, which obviously will be provided down the
8 road. But there's quite a lot of it.

9 And the nature of these record systems too,
10 Your Honor, it's like MSU does not have a file room with
11 employee records. They couldn't just go pull like Dr. Xi's
12 personnel folder or anything. What their general counsel did
13 was over -- went to numerous different departments and offices
14 within MSU pulling anything they had on Dr. Xi. And I would be
15 surprised if we haven't bled them dry. And everything we've
16 gotten from them we have provided to the defense.

17 *THE COURT:* All right. One specific category you've
18 described in going through your overall theory of the case you
19 didn't mention in discovery. That would be documents from
20 airlines. Is that part of material you gathered and turned
21 over too or not?

22 *MR. FRANK:* It is, but the defense wants records from
23 airlines that we did not subpoena and do not plan on
24 subpoenaing. We've provided -- and I'll look over my shoulder
25 to my agent to correct me if I'm wrong -- but we provided

1 records from Delta, United, Lufthansa, and also records from
2 the online travel agency Orbitz.

3 *THE COURT:* All right. All right. I guess the last
4 question in a general way before I hear from the defense, it's
5 an unopposed defense motion, so in some sense the course of
6 least resistance is just for me to grant it and be done because
7 you don't care. But talk to me about that. Because -- and
8 I'll hear more from Mr. Safer or Ms. Hays or whoever argues it,
9 but this looks a lot like civil discovery requests that I used
10 to write or respond to. It's probably not quite as fulsome as
11 all of those, but it's in that nature.

12 You do a lot of document cases. I mean, if we open
13 the door to this, we've got mini civil discovery in all your
14 criminal cases, and do you want that? And is that -- why isn't
15 it of concern to the government if these subpoenas go to
16 companies or entities that you think are victims of the fraud?
17 Don't you want to be in between that?

18 *MR. FRANK:* Well, the way I look at this, Your Honor,
19 is in all the discovery we've provided them, I have not seen
20 anything that is exculpatory or that can be spun as being
21 exculpatory.

22 By the same token, Dr. Xi's travel history -- we're
23 not saying he never traveled. I mean, the man traveled
24 incessantly. I've never had a case -- it's almost like that
25 movie where George Clooney flies around firing people. I mean,

1 he's always in the air.

2 *THE COURT:* Right. *Up in the Air.*

3 *MR. FRANK:* Right, *Up in the Air.* Dr. Xi is like an
4 international George Clooney when it comes to travel frequency.
5 Trips to Europe, to the Far East. From the Far East to Europe
6 back to the States.

7 We also know that -- and putting on these conferences
8 did require, you know, some level of travel. Our theory of the
9 case is that he basically exploited his position as a fellow at
10 IEEE and as a distinguished professor at MSU -- who is not
11 going to be questioned by people in travel offices -- he
12 exploited that position to make a lot of money on the side.

13 The defense's theory of the case, I believe, is going
14 to be that, "Well, no, he was doing all this travel and it was
15 in support of these conferences. And, sure, he was submitting
16 documents -- or rather claims that were supported by forged
17 documents, but he wasn't asking for money that he wasn't
18 entitled to."

19 The reason I think that's going to be the defense's
20 theory of the case is that Dr. Xi had retained the firm
21 Arent Fox in Washington, D.C. for about seven months before we
22 indicted him, and we had several meetings with
23 Peter Zeidenberg, Z-E-I-D-E-N-B-U-R-G, who is one of the
24 partners at Arent. We had three reverse proffers and evidence
25 reviews with them, and that was the theory that he advanced.

1 And I think that the defense request is -- yes, it's broad, but
2 I think that they are looking for pots of information that
3 might support this theory of, okay, these are fraudulent
4 documents, but all of this travel -- I mean, he was traveling a
5 lot and he was going to these places, and when he's at these
6 places he's doing things to prepare for these conferences. And
7 these conferences are very big deals. They pull experts from
8 all over the world to foreign countries to -- including
9 conferences to the U.S.

10 So I think what they are looking at is from a
11 due-diligence standpoint. Because what we've shown them so
12 far -- and we have been very open, and we were very open
13 with Mr. Zeidenberg, showing him what we had and what our
14 theory of the case was, and he came up with what their -- and
15 obviously Mr. Safer is not committed to this defense -- but
16 Mr. Zeidenberg came up with a theory of the case, and then we
17 had another meeting and we told him why their presentation had
18 not caused us to lose faith in our proofs.

19 So I think that if I'm Mr. Safer, I'm looking at it
20 thinking "I'm not going to find much of a defense in the
21 discovery. I've got to look outside of the discovery." And I
22 will say our production goes well beyond our discovery
23 obligations. I mean, there's a lot more than Rule 16, Brady,
24 Giglio, and -- Brady and Giglio in there.

25 If I'm Mr. Safer, I'm looking at it thinking "I've

1 got to go to these other places and see if there is the
2 material that I can try and build a defense with that says
3 okay" -- because they can't -- they are not going to be able to
4 contest that these documents were not forged and that he
5 actually flew the flights that he claimed.

6 *THE COURT:* They might not characterize it as forged,
7 and we'll let Mr. Safer speak for it --

8 *MR. FRANK:* Right.

9 *THE COURT:* -- but they might characterize it as
10 mistakes because the guy is traveling all over the place and he
11 knows he was in, you know, Dubai or wherever but didn't get the
12 number right because he's going through all kinds of travel
13 documents.

14 *MR. FRANK:* And that's -- that was part of the --
15 rather the approach that his prior counsel was taking. So I
16 looked at their -- the materials that they are hoping to
17 subpoena, the types of information they are hoping to subpoena.
18 And, yes, I acknowledge that they are very broad, but this is
19 also a pretty unusual factual scenario.

20 So if I'm Mr. Safer, I am going to try and cast as
21 wide a net as possible in the hopes of being able to build -- I
22 mean, I'm confident I can build a picture about where he
23 wasn't, places he didn't go, and that he then turned around
24 consistently and over time submitted claims with forged
25 documents for travel he didn't take and that he was double

1 dipping as between MSU and IEEE.

2 *THE COURT:* And how do you intend in summary to prove
3 that it wasn't just a series of mistakes but was actually the
4 product of an intentional scheme to defraud? Just the sheer
5 volume of it or the nature?

6 *MR. FRANK:* Because forging documents in the way that
7 they were forged and doing things like --

8 *THE COURT:* When you say forged, though, I mean, that
9 carries a lot of freight. That suggests, you know, to stick
10 with the movie reference, *Catch Me If You Can*, some guy sitting
11 there with, you know, checks that he's changing the meter code.
12 I don't hear you in that. In the summaries here you say,
13 "Well, you know, there were ticket numbers that didn't match.
14 There were cancellations. There were some double counts."
15 When you say forged --

16 *MR. FRANK:* Forged is a subset of fraudulent. I will
17 say fraudulent. Some of them were forged. I mean, when you --
18 airline itineraries know how to spell the cities that you're
19 flying to or from. When you submit a document that purports to
20 be an airline document and it misspells Detroit, that's not a
21 genuine document. So we have -- within this subset of
22 fraudulent documents, we have instances where, as I said, it's
23 submitting a claim for a flight that you booked, you got an
24 itinerary number, you canceled it, we've got your credit card
25 records showing that that -- there was an immediate refund of

1 that charge, but then you turned around and you submitted it
2 for payment. So we've got forged documents. We've got
3 fraudulent documents.

4 *THE COURT:* So you have some of his credit card
5 records too?

6 *MR. FRANK:* Oh, yes. Yes, sir. Credit card records
7 showing that the flight that he submitted a claim for was an
8 expense that was immediately refunded as soon as he canceled
9 the itinerary.

10 *THE COURT:* All right. Okay. Why don't I go to the
11 defense and hear from Mr. Safer. Thank you for the added
12 background. And we'll get the defense perspective on the
13 motion, and if you want on anything else that you --

14 *MR. FRANK:* Yes, Your Honor. I would just add, as I
15 said, we've -- we've given them an awful lot of material to
16 digest, and because we got it from -- and there is repetition
17 within those pots of evidence because things came in piecemeal
18 from some of the airlines and things came in piecemeal from
19 different offices within MSU, so there's going to be repetition
20 within the bodies of or the categories of -- within the various
21 productions that we've turned over. So once they go through
22 and they digest it and then they look at the things that they
23 are -- the bodies of documents that relate to their motion, I
24 wouldn't be surprised if this list pares down significantly.
25 But once they do figure out what they want that they don't have

1 and that we're not going to go get -- the reason I'm not
2 objecting to the motion is because I view this as -- I mean,
3 although the Court did bring up a law enforcement equity which
4 is setting an informal precedent -- the informal precedent that
5 you raised, that does implicate a law enforcement equity. But
6 setting that aside, the way I look at it is this is really
7 about the defense trying to convince the Court that it would be
8 appropriate for you to exercise your authority to put the
9 subpoenas in a special category. And given the nature of the
10 case, it did not strike me as unreasonable for them to be
11 asking for that.

12 *THE COURT:* All right. We'll go to Mr. Safer. Thank
13 you.

14 Go ahead.

15 *MR. SAFER:* Thank you, Your Honor. I would like to
16 begin, because I don't want to forget to say it, that I think
17 the government's approach, Mr. Frank's approach in this case
18 has been exemplary. I mean, there's no question that they have
19 turned over material that is beyond what is required at
20 Rule 16. They have not only not dumped documents on us but
21 also tried to explain where those documents fit within their
22 theory. And they have provided us voluminous documents. I
23 think Mr. Frank's approach to this motion is also in the finest
24 traditions of the Department of Justice. And so I want to
25 acknowledge that at the very outset.

1 I would also like to describe for Your Honor how --
2 why the documents sought are at the heart of our defense and
3 why they are necessary for us to put on a defense in this case.

4 Dr. Xi was, as Mr. Frank said, not only a top
5 executive at IEEE, a president of one of the sections and one
6 of the world's leaders -- remains one of the world's leaders in
7 robotics -- but somebody who was sought after as both a
8 presenter and an organizer of these conferences throughout the
9 world. And as a result, he was flying all over the world
10 constantly. And there is -- I don't -- as you heard, there's
11 not going to be a dispute about that. He was at the vast
12 majority of the places that he has been reimbursed for. He was
13 there, we think, at all of them. I think there will be no
14 dispute about the vast majority of them.

15 Because of Dr. Xi's renown, he brought to
16 Michigan State tens of millions of dollars that -- much of
17 which was placed in a Michigan State account from which these
18 reimbursements were drawn.

19 We are seeking the records from that account that
20 will show that both the inflow and outflow from those
21 accounts -- because it goes directly to Dr. Xi's intent and his
22 lack of fraudulent intent -- he was able to withdraw money from
23 those accounts for --

24 *THE COURT:* Help me understand how that helps on
25 intent. Even if he generated a whole bunch of money for the

1 school, if he double-booked flights or double-charged them for
2 flights, it's still wrong.

3 *MR. SAFER:* Absolutely. And he didn't.

4 *THE COURT:* Okay. So how does it help you to see how
5 much money he brings into the university?

6 *MR. SAFER:* Because under the regulations that we
7 also seek from Michigan State, he was able to withdraw that
8 money for a plethora of reasons. That some of which are very
9 close to personal use. But certainly if you want to say in
10 professional use for comfort, for food, for travel, for a
11 variety of different things. If he were going to defraud
12 Michigan State University or if he were going to enrich himself
13 at Michigan State University's expense, he would have taken
14 money from that account with ease in any number of ways and
15 used it.

16 *THE COURT:* So if the government hasn't -- I take it
17 the government hasn't produced records of those accounts?

18 *MR. SAFER:* I don't think the government has the
19 records of those accounts. They produced checks from the
20 account, but I don't think the government has --

21 *THE COURT:* You haven't probably gotten through
22 everything yet that was just submitted.

23 *MR. SAFER:* That is correct, Your Honor.

24 *THE COURT:* Okay. So, you know, this is a broader
25 question and a tactical one -- and I know you've prosecuted

1 plenty of cases -- from a defense perspective, though, why do
2 you really want this? I mean, why don't you want to make that
3 argument to the jury that, "Look, you know, the government
4 hasn't even bothered to show you how these things really work
5 because they don't want you to know that Mr. Xi doesn't have
6 any motive or reason to do that. There's a much easier pathway
7 if he really wanted a few hundred, a thousand bucks for a plane
8 ticket." You know, normally that's what I imagine a defendant
9 is going to say in a case like this. Look at all -- I mean,
10 you've actually got your ready-made list. Look at all the
11 things that the government didn't bring you to prove intent.
12 How do you see all of this helping you develop the case?

13 *MR. SAFER:* Your Honor is exactly right. I think in
14 the typical case that's what a criminal defense attorney would
15 say. This is not the typical case. We are confident -- so,
16 first of all, I don't think it's true that the government
17 doesn't want to see what's there. I think they have tried. I
18 don't think they see the case from the same perspective as we
19 do, obviously. But I don't think I would want to stand in
20 front of a jury and say that because I don't think it's true.

21 Secondly, in this -- this is the unique case where we
22 want to do two things. First, we certainly want to say the
23 government approach is wrong, and hopefully I'll get to that in
24 a little bit as to where the government has taken perhaps
25 reasonable inferences from the evidence but inferences that are

1 incorrect and made mistakes as a result of that and that they
2 haven't -- they haven't examined the full picture. And so we
3 certainly want to point that out.

4 But this is the unique case, Your Honor, where the
5 full picture is going to exonerate the defendant. It's more
6 than just saying the government has failed in its burden of
7 proof. We will -- if given the opportunity to have these
8 documents, we will prove him innocent. We will prove that in
9 fact he did not defraud anybody, that these monies were
10 appropriately paid to him. Indeed that he had legitimate
11 expenses that far exceeded the reimbursements that he got. So
12 quite different from the conclusion that he double dipped and
13 that he enriched himself at these institutions' expenses. He
14 absorbed losses.

15 *THE COURT:* So let me -- and now I don't want you to
16 have to get farther than you want to go because obviously
17 you're still developing the case and you don't have to tell me
18 any of the defense at this point -- but let me just give you a
19 hypothetical. If you thought you could show with these
20 accounts that the total money into the account and the total
21 money that Mr. Xi could have gotten out of it, because of money
22 he spent out of his pocket for a whole bunch of things in
23 addition to airlines, leaves the university in a net positive
24 position, even if one of the airline submissions is in the
25 words of Mr. Frank fraudulent, I mean, is that something you

1 think would mount a defense to the case, or am I overreading
2 the kinds of things that you're trying to develop?

3 *MR. SAFER:* I think you're not overreading it,
4 Your Honor. I don't think I was clear in the two different
5 ways we want to use the evidence.

6 One is in the account with regard to the inflows,
7 that's just the argument that goes to intent. That he brought
8 a lot of money to Michigan State. He was able to use that in a
9 broad number of ways. If he wanted to defraud Michigan State,
10 that's how he would have done it. He didn't intend to defraud.
11 Full stop, that's the end of that.

12 Now if we look at just the reimbursement aspect of
13 the case where he's traveling and he's doing these things for
14 Michigan State and for IEEE, if we look just at the money that
15 he actually spent out of his own pocket for that travel and
16 travel expense-related expenses and conference-related
17 expenses, without regard to what he brought in, we will find
18 that that amount, the outflow of money that he paid for that
19 travel, et cetera, exceeded the amount of money for which he
20 was reimbursed and was -- legitimately could have been
21 reimbursed for.

22 *THE COURT:* All right. So sticking with the sort of
23 hypothetical on that category, on any given conference he's got
24 to spend out of his pocket or advance a whole bunch of expenses
25 for meals, hotels, airlines, Uber, whatever else it may be, and

1 he gets money reimbursed for that whole array of things, and am
2 I hearing you that if you could establish it you think it would
3 be a valid defense in a case like that to say, "Well, even if
4 this particular line item, airline travel, is just plain wrong,
5 if the overall expenses that he incurred exceed the overall
6 dollars that he got, it's still not a fraud"?

7 *MR. SAFER:* Yes, I think that's right, that in that
8 you have to take money or property. You have to be -- you
9 know, the object of the fraud has to be to take money or
10 property, and he did not. And so that -- that total
11 represents -- you know, shows that he did not have the intent
12 to get money or property from either of these organizations.

13 But second, it will make clear that none of those
14 quotations that were submitted for flights were fraudulent.
15 And now, Your Honor, I'll get to the -- you know, to the
16 issue -- those receipts or proof that was submitted were
17 neither forged nor really a mistake. So I'll try to explain in
18 some detail, with the caveat that we haven't gotten all of the
19 material that we need. But here is the general --

20 *THE COURT:* And we can continue to speak in more or
21 less hypothetical terms because we're early in the case and I
22 understand you haven't had a chance to exhaust everything you
23 need to do, but at least you'll give me an idea of where you're
24 going and why these documents in your view would be critical.

25 *MR. SAFER:* Thank you. So Mr. -- Dr. Xi would take

1 trips for a number of different reasons. Some of the trips
2 related and some of the legs of the trips related to a
3 conference that he was organizing or a conference that he was
4 putting together for IEEE. And as Mr. Frank said, when these
5 trips are organized years -- these conferences are organized
6 years in advance. So, for instance, there was a very big
7 conference in 2014. The beginning of that organization -- of
8 the organization of that conference was in 2011. And he -- and
9 Dr. Xi had -- was the conference chair, so he was charged with
10 getting sponsors for the organization -- for the conference,
11 getting presenters, getting an audience, getting the venue.
12 And so that required exhaustive travel.

13 But at the same time he might be in the same area of
14 the world and then he is presenting at a conference which helps
15 bring in some of those tens of millions of dollars to Michigan
16 State University because he presents and he gets support for
17 further research with regard to robotics.

18 Now, here is the complication for all of that: In
19 order to save those organizations money, Dr. Xi bought
20 around-the-world tickets, which are tickets that as long as
21 you're going in the same direction --

22 *THE COURT:* Right, I used to have clients in
23 Singapore who would get them regularly.

24 *MR. SAFER:* All right. So you're way ahead of me.

25 *THE COURT:* No, I'm not way ahead of you, and that's

1 long ago, but at the time they cost around 15,000 bucks.

2 MR. SAFER: Yeah. Now they are between seven and
3 eight.

4 THE COURT: Okay.

5 MR. SAFER: But, of course, Dr. Xi could not or it
6 would not be right because there were different legs of the
7 trip that were responsible -- that were attributable to
8 different organizations. He did not bill the entirety of that
9 ticket to, for example, Michigan State.

10 And now just to use examples, let's say that he was
11 traveling and there was one leg of the trip -- and it was
12 rarely this clean -- but there was one leg of the trip that was
13 to organize the conference and then one leg of the trip to
14 present a paper. So the organization of the conference for
15 IEEE, the presentation of the paper for Michigan State. What
16 Dr. -- so at the end of the day what Dr. Xi would do is he
17 would have somebody -- he'd say, "Okay, this leg of the trip
18 was for IEEE. Bill them for that." And what they would do was
19 they would often get a fare quotation, or even as Mr. Hagen
20 says purchase a round-trip ticket from those points of entry
21 and exit, and then cancel the ticket because -- and that would
22 give you a current price quotation for that, and then they
23 would submit that.

24 Now, the problem, of course, is it would have been
25 great if they had written on here "This is only a quotation.

1 We didn't take this exact flight. We flew on an
2 around-the-world ticket." Which was not done. And therein
3 lies the problem. Because you could call that a fraudulent
4 quotation when really -- really it was meant for a different
5 purpose. It was meant to say "This is a representation of a
6 ticket for that leg and we're billing you for that." And if we
7 get the documents that have all of those flights from all of
8 the airlines -- and one -- another wrinkle is that United, of
9 course, is part of the Star Alliance, and United will
10 present -- provide to the government, as they have, and the
11 government has provided to us the parts of that trip that
12 United flights are, but then they have open for their alliance
13 partners, we don't have that leg, and that those are important
14 legs.

15 *THE COURT:* Let me just stick with that hypothetical
16 a minute. Almost every around-the-world ticket situation I've
17 seen, if you added up the commercial price for the separate
18 legs, it's going to greatly exceed the around-the-world price.
19 I mean, that's the whole point of getting the around-the-world
20 ticket. If somebody submits all of the separate legs and gets
21 reimbursement for the separate legs but only outflows, whether
22 it's 7,000 or 15,000, for the around-the-world ticket, how does
23 that fit with a wire fraud theory and a defense in your view?

24 *MR. SAFER:* Then -- that's a wonderful question,
25 Your Honor. One that we will raise with the jury. Because

1 Dr. Xi was careful to make sure that the total reimbursement
2 that he submitted for those legs did not exceed the
3 around-the-world ticket. And that's not something that
4 somebody who has the intent to defraud would do.

5 So was this done imperfectly? It was. But it was
6 not done -- if we can -- and this is the unique case. You
7 know, I hope -- I mean, because we labored very hard to try to
8 tailor these requests so that they were not typical of civil
9 discovery but rather very focused on what we need for our
10 defense. But I don't think this sets a precedent, Your Honor,
11 because this is -- you know, I'm sort of reminded of when you
12 said -- when you said that, what flashed through my mind was --
13 and I'm old -- so when the general manager of the New York
14 Giants was asked, "Hey, you've torn up Lawrence Taylor's
15 contract. Doesn't that set a dangerous precedent?" And he
16 said, "Yes, it sets a precedent. What I would tell the next
17 person is 'If you play like Lawrence Taylor, I'll rip up your
18 contract too.'"

19 You know, I would say it sets a precedent in the next
20 case where somebody has flown thousands of flights literally in
21 an eight-year period of time, then there is going to be broad
22 discovery. But that is -- this is that rare case.

23 So, you know, we need the -- so now we're back to the
24 form of the -- of what was submitted. And the totals of what
25 is submitted.

1 One of the reasons we believe the government says
2 that there was double dipping is they do not understand because
3 they don't have all of the documents, and neither do we, what
4 those -- what the reimbursement checks were for.

5 So, for example, IEEE has -- gets a stack of
6 reimbursements and they will have -- they will issue a check
7 for \$30,000 or there will be a check issued for \$30,000. That
8 has a whole bunch of receipts behind it. But if you look at
9 the -- and, yes, sometimes those receipts are duplicated in
10 another pile, but you will -- but those receipts -- like I'll
11 give you a for-instance. A hotel bill is submitted and it's
12 attributed to one conference. That same hotel bill is found in
13 another pile for a different conference. But all that's
14 reimbursed the second time is a restaurant tab because there
15 was a meal for that conference. But it's the same receipt.
16 And so the two receipts are in the same pile. But if you dig
17 into the details, some of which we have, some of which we do
18 not, and we believe IEEE will have and Michigan State will
19 have, you'll see that those receipts were not double-counted
20 and rather portions of them were used for different
21 reimbursements. And that is what we are trying -- all that we
22 are trying to do is we are trying to show that there were
23 not -- there was not double dipping but rather that there was
24 reimburs -- proper reimbursement.

25 In terms of a personnel file, Your Honor, the -- we

1 believe that Michigan State does have a personnel file.

2 *THE COURT:* You know, I didn't question Mr. Frank on
3 this, but Michigan has something called the Bullard-Plawecki
4 Right-to-Know Act which requires an employer to produce a
5 personnel file on the request of an employee or former
6 employee. Why doesn't that get you what you want without a
7 subpoena?

8 *MR. SAFER:* Well, we can try -- we can try that. You
9 know, we can try that. And we have, for example, tried to get
10 credit card records that we'll need and airline records without
11 burdening -- without asking the Court for a subpoena. Although
12 some of those were not -- we're hitting brick walls and we're
13 going to need to subpoena, if the Court allows.

14 *THE COURT:* Okay. Other things that you want to
15 highlight?

16 *MR. SAFER:* That is the essence of the theory of our
17 case, Your Honor, and why I think this is a very different case
18 than most and why we need this kind of detailed presentation --
19 detailed information from these entities.

20 *THE COURT:* All right. Thank you.

21 *MR. SAFER:* Thank you, Your Honor.

22 *THE COURT:* I'm going to give Mr. Frank a chance to
23 respond, and then I'll give you the last word on your own
24 motion. Okay?

25 *MR. FRANK:* In no particular order, Your Honor.

1 First off, I believe that all the account-related information
2 that Mr. Safer was talking about has been provided. I think
3 once he's had -- he and his team have had a chance to look
4 through that, that may obviate the need for that subpoena.
5 But, again, that's what I mentioned before about how their list
6 may pare down once they have had a chance to chew through
7 everything we've given them.

8 The notion that -- and this is, of course -- this
9 will be something that we'll fight out at trial -- but the idea
10 that donations that came into MSU based upon Dr. Xi's being
11 there was somehow his funds, our proofs from MSU will establish
12 that, no, you donate money to MSU on Monday, on Tuesday that's
13 MSU's money and you don't get to pull it out without MSU's
14 approval. So the idea that there's some sort of -- these
15 accounts were his money for the taking, the proofs will not
16 bear that out. Nor will his tax returns for that matter. And
17 those have also been provided to the defense.

18 Let's see, I could address the around-the-world
19 ticket theory, but, again, I'll save that for trial.

20 *THE COURT:* Well, what's your general response?

21 *MR. FRANK:* The general response is that, for
22 example, if you've got a 9,000 around-the-world ticket, \$9,000
23 around-the-world ticket and then you submit claims that result
24 in you being paid \$34,000 for that travel, you've committed
25 fraud.

1 *THE COURT:* And I think what Mr. Safer is saying is
2 in his view the proofs will show that even if he broke up the
3 segments, he never ultimately asked for more than the 9,000 in
4 that example. And that may be factually disputed --

5 *MR. FRANK:* I think the proofs will show we've got
6 one instance where there's a \$9,000 ticket and he was
7 reimbursed \$34,000 in claims on that travel.

8 I guess the last thing I would point out. I think
9 the Court was -- if I heard the question correctly -- I'll
10 paraphrase what I think I heard, and you can correct me if I
11 got it wrong. As far as the fraud theory goes, the question in
12 essence was: If you lie to get something that you're entitled
13 to, is that fraud? The government's theory is no that's not
14 fraud. Fraud requires -- the element of material
15 misrepresentation requires that you get something you're not
16 entitled to. So if you lie to get something that you're
17 entitled to and you could have had simply by telling the truth,
18 that's not our theory of the case because we don't think that
19 would be fraud.

20 *THE COURT:* All right.

21 *MR. FRANK:* That's all I have at this time,
22 Your Honor.

23 *THE COURT:* All right, thanks. One other question I
24 meant to ask, and I'll give you both a chance to address it --
25 and this is really getting far afield from the issues today, so

1 if neither side is prepared to address or doesn't want to --
2 whenever I hear that somebody who used to study under this
3 defendant or vice versa somebody who used to be a professor is
4 producing documents for the other person, I'm always thinking
5 professional rivalry. Is that an issue in the case? In other
6 words, if the individual now in Oklahoma -- whose name I can't
7 pronounce anyway -- is a professional rival, there's certainly
8 a motive to say, "Hey, it's Mr. -- it's Dr. Xi, it's not me."

9 *MR. FRANK:* Right.

10 *THE COURT:* And, you know, he's the other person with
11 access to the same money.

12 *MR. FRANK:* I think that's going to be -- I won't
13 call it a hard sell. I think that's going to be an impossible
14 sell if that's where the defense wants to go with this.

15 *THE COURT:* Okay.

16 *MR. FRANK:* Because Dr. Sheng, his place in the food
17 chain -- and Mr. Safer is absolutely right, Dr. Xi is
18 world-renowned in the field of nanorobotics. He's as big a
19 wheel as you become in this field. And Dr. Sheng in that
20 pecking order is way down the totem pole. And I think part of
21 it may also be a -- Dr. Sheng is a Chinese citizen. I think
22 there's a cultural aspect there of you don't -- there are
23 certain people that you don't question. If they tell you
24 something is so or that you -- you -- you don't push back. It
25 may be in the American -- it may be in the DNA of people

1 brought up in the United States. It's not necessarily
2 culturally the same in China.

3 And then there's also the aspect of, again, Dr. Xi is
4 as big a wheel as they come. Dr. Sheng is not. Dr. Sheng
5 looked up and admired Dr. Xi. I don't think there's -- it
6 would never occur to Dr. Sheng that he was any kind of rival
7 with Dr. Xi. He was just happy to be in the same room with
8 him.

9 *THE COURT:* Well, this is far afield as I said, it's
10 a matter of argument, but I just bring it up because obviously
11 Dr. Xi would be less of a big wheel if he's convicted of a
12 federal felony.

13 *MR. FRANK:* I'm sorry?

14 *THE COURT:* He would obviously be less of a big wheel
15 if he's convicted of a federal felony and somebody else moved
16 in.

17 *MR. FRANK:* Right. If Dr. Xi got hit by a bus on the
18 way home, I'd have no doubt there would be people vying for his
19 spot, but Dr. Sheng is so far back in the pack, he's not going
20 to be that guy.

21 *THE COURT:* All right. Thanks.

22 Any last words on the motion, Mr. Safer?

23 *MR. SAFER:* No, Your Honor. Thank you for the
24 opportunity to discuss these matters with you.

25 *THE COURT:* Well, thank you to counsel. It was very

1 helpful for me because I have a lot less information than
2 either of you do about the case. It is a somewhat unusual
3 case, I think. Even though it's a wire fraud and we see that
4 all the time, and they are all document-intensive, the nature
5 of the case is a little different. I noticed that when the
6 Indictment first came in. And this has helped me get a better
7 understanding of at least on a preliminary basis where some of
8 the flashpoints might be.

9 What I'm going to do is give you a ruling today. And
10 I'm going to deny the motion today. I'm going to do it without
11 prejudice so that if Mr. Safer believes there are things after
12 he's had a chance to go through all of the document discovery
13 of the government that he still needs, he can refresh it. But
14 I want to give you some more concrete reasons for it so that
15 you get an indication of what I'm likely to find fits and what
16 I'm likely to find doesn't. And, of course, it doesn't
17 preclude you from bringing the request once again.

18 The request in criminal cases for pretrial production
19 of documents by subpoena is pretty unusual. Certainly in this
20 district. I've seen it a few times. I think I've denied it
21 every time. And that's because normally the Rule 17(c)
22 subpoena process is designed to be very focused, very limited.
23 And, of course, normally if you're subpoenaing documents,
24 you're subpoenaing them for production at trial, not for
25 pretrial examination as we do on the civil side. And what the

1 Supreme Court has done, I think, in framing when there may be a
2 proper basis for exception to that, as the parties and
3 particularly Mr. Safer's brief outlines, under the Nixon
4 framework, just to summarize it, you need the relevance, you
5 need the accessibility, and then what I would call focus or
6 specificity as opposed to a fishing expedition. Those are kind
7 of the three general categories of argument.

8 And let me start with the last one, the specificity.
9 I mean to cast no aspersions on the people who wrote the
10 request. They are the kind of requests that I would have
11 wanted to write when I was in civil practice too. But I think
12 they are the antithesis of specific requests. They strike me
13 as very broad civil litigation-style requests. They come
14 complete with definitions and instructions that are very broad.
15 You know, they want the term "document" to be used in the
16 broadest sense and include without limitation about 80 percent
17 of the page in terms of defining what that calls for.
18 "Concerning" means in any way, directly or indirectly
19 discussing, describing, regarding. The request is not for a
20 particular policy or a particular, you know, faculty
21 requirement or whatever it may be but all MSU policies,
22 procedures, guidance, and training materials related to the
23 submission of expense reimbursement requests. I can't even
24 imagine if I got that at MSU where I would begin to collect all
25 my policies through all of the different departments through

1 the entire university that deal with expense reimbursement.
2 And those are simply examples. But what they tell me is that
3 for the most part the requests, at least as I read them, and
4 that's true for the IEEE requests as well as for the MSU
5 requests, they are crafted to be as inclusive as possible,
6 which naturally is what we do on the civil side, we see it all
7 the time, but in the civil side there's also very
8 well-established process and procedure under Rule 45 for the
9 protection of the party subpoenaed, for example, to come in.
10 And although that could happen in a criminal case, because they
11 rarely happen, there just isn't well-established procedures for
12 this. So I'm situated with proposed subpoenas to the putative
13 victims of the fraud to come up with what amounts to massive
14 discovery requests and no established way for them to come to
15 me and complain about it. I think that's problematic, and I
16 think that violates the spirit of what Nixon has in mind in the
17 specificity requirement. And the cases that we referenced in
18 our earlier order at the lower court levels I think carry that
19 forward. It's not supposed to be a discovery device. 17(c) is
20 supposed to be much more limited. And these -- without going
21 into every single one of them -- strike me as too far afield.

22 And that really segues into relevance and
23 admissibility, which to some extent go hand in hand. And what
24 Mr. Safer here has articulated helps me a lot more than just
25 the written brief. The written brief was fine, but the

1 articulation of some particular concrete defense avenues helps
2 me understand more what some of the requests are directed to.

3 Before the hearing, before knowing that, I just went
4 through the requests on my own and outlined what I could
5 imagine if I were, you know, in defense counsel's perspective
6 what might be of greatest interest to me, without really
7 knowing exactly where the government was going or where the
8 defense was going. And the one thing that I thought I would
9 definitely want to focus on, it's on page 4 of the brief, the
10 MSU subpoena paragraph 3, "All statements between 2008 and 2016
11 for MSU financial accounts from which Dr. Xi sought
12 reimbursement." I have there "Maybe." "Maybe." I need to
13 understand more about it.

14 And that's where I am as I hear the argument today.
15 That kind of information, to the extent it isn't in the
16 government's discovery, would seem to be quite directly germane
17 to both aspects of the theory that Mr. Safer outlines. The
18 general theory on intent: If he wanted to steal, there were
19 lots of easier ways than forging airline vouchers. And the
20 other being that these really weren't mistakes or fraud, they
21 were simply the practical effort to deal with things like
22 around-the-world tickets but the reality that individual
23 segments are properly allocable to different conferences along
24 the way. And those kinds of statements would help the defense
25 to either demonstrate or fail to demonstrate that in breaking

1 out the segments of around-the-world tickets, you know, there
2 was in fact no over-reimbursement. So maybe, but we'll have to
3 see, I think, first what's in the government's discovery. I
4 think that's where the avenues first need to be exhausted to
5 preserve the ordinary process of the criminal discovery such as
6 it is and distinguish it from everything else.

7 The other things there, I mean, in some general sense
8 "All MSU policies and procedures and guidances" might have some
9 bare relevance, but it's hard for me to see how anything that I
10 can identify or even that Mr. Safer can identify now is readily
11 admissible. You know, documents showing the MSU guidance,
12 recommendations, or procedures. Same kind of thing, it seems
13 to me.

14 Furthermore, that to the extent they matter, they
15 probably should be in Mr. -- or Dr. Xi's possession already.
16 You know, when you get to 4, we're talking about all
17 communications on a whole series of things, which especially
18 given the definitions is vast. And I can't imagine even if
19 there could be some potentially relevant item that there would
20 be anything I can readily identify as admissible now.

21 The personnel file, we already talked about the
22 Bullard-Plawecki Act in Michigan as being a much more direct
23 way to that than criminal subpoena. And I can go through the
24 other items. I don't see how, for example, courses taught by
25 Dr. Xi are particularly germane. Plus, I'd expect those to be

1 on Dr. Xi's CV anyway.

2 So when you go over to the IEEE, the list is similar.
3 After I listened to Mr. Safer today, I think that the two items
4 that I had identified in advance, items 1 and 6 which deal with
5 the same kinds of things that I referenced in that MSU list,
6 may well turn out to be germane, might fit the Nixon framework
7 if it's pared down to that and if it isn't in the government
8 discovery, but the other items, again, strike me as overbroad,
9 more in the aspect of a fishing discovery expedition as opposed
10 to a targeted look for relevant and admissible information.

11 So I'm not going to prevent Mr. Safer from coming
12 back after the defense has had a chance to complete its review
13 of the government discovery most recently submitted last week
14 and say "Hey, we're still missing some things." Mr. Frank
15 thinks maybe you're missing, by the time you get through it
16 all, less than you think. And then I'll look at it again under
17 the Nixon framework. And by the time we get to that, if we do,
18 Mr. Safer, Ms. Hays, you'll have an opportunity to focus in
19 more directly in your briefing on the concerns I'm articulating
20 here and try to persuade me that you still need something if
21 you do. But for today I'll deny the motion for those reasons
22 but without prejudice to submission of an additional request as
23 we go.

24 I don't think we have anything in terms of final
25 pretrial or trial until midsummer; is that right?

1 *MR. SAFER:* I think June is the trial that's set at
2 the moment, Your Honor.

3 *THE COURT:* Okay. All right. So we have time --

4 *MR. SAFER:* Yes.

5 *THE COURT:* -- even if we go on that. And I gather
6 from the way you said that you might believe you need some more
7 time than that in any event.

8 *MR. SAFER:* Yes, Your Honor.

9 *THE COURT:* Okay. Are there other things that we can
10 or should do today from the government's perspective?

11 *MR. FRANK:* Um, I don't think so, Your Honor. It
12 might be helpful to state for the record that we have got five
13 banker's boxes of documents at the FBI's Lansing office that
14 the defense wants to come copy. I think we've already provided
15 digital copies of that information, but I have not done a
16 page-by-page matchup, so we're going to set that up.

17 *THE COURT:* Then you have something to do on the
18 weekend, right?

19 *MR. FRANK:* Exactly.

20 *MR. SAFER:* While Mr. Frank is volunteering his time.

21 *MR. FRANK:* I was about to say, I have to earn my
22 paycheck.

23 *THE COURT:* That's right. You're not on furlough,
24 you're on nonpay status probably.

25 *MR. FRANK:* Yes, Your Honor. Because my job involves

1 protection of life and property, so it's important that I be on
2 the job but not that I be paid.

3 *THE COURT:* Right.

4 *MR. FRANK:* In any event, we're going to get that
5 knocked out in the next couple of weeks.

6 *THE COURT:* Okay. And from your perspective,
7 Mr. Safer, anything else today?

8 *MR. SAFER:* No, Your Honor. Thank you.

9 *THE COURT:* Okay. Thank you all.

10 *MS. HAYS:* Thank you, Your Honor.

11 *THE CLERK:* Court is in recess.

12 *(Proceeding concluded at 3:03 p.m.)*

13 * * * * *

14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above-entitled matter.

16 I further certify that the transcript fees and format
17 comply with those prescribed by the court and the Judicial
18 Conference of the United States.

19
20 Date: April 24, 2019

21
22 **/s/ Glenda Trexler**

23 Glenda Trexler, CSR-1436, RPR, CRR
24
25